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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1006~~ 706

ETEL OBER and IOAN NAGYIVAN,
Petitioners,

vs.

JAMES C. NAGY and JOSEPH NAGY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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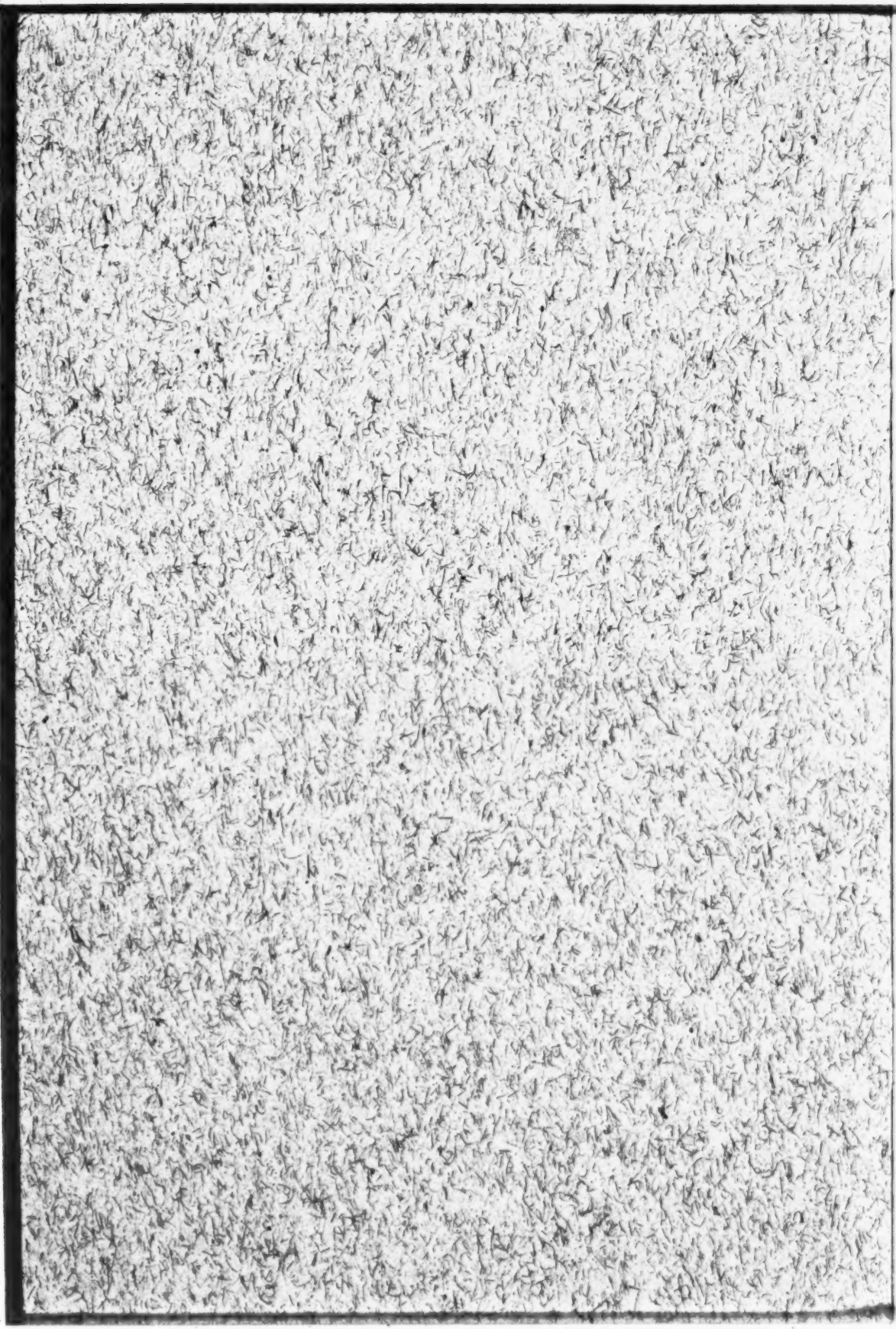

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1308.

ETEL OBER and IOAN NAGYIVAN,

Petitioners,

vs.

JAMES C. NAGY and JOSEPH NAGY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

Whether heirship can be established solely upon heresay evidence.

REASONS FOR DENYING THE WRIT.

1. This case arose upon a Petition to Determine Heirship filed pursuant to Title 2123 of the Ohio Revised Code.

2. With respect to the nature of evidence required to prove heirship, Ohio Revised Code Section 2123.05, in pertinent part, provides:

> "* * * the probate court may hear proof taken *by commission, or by witnesses produced in open court,* of the facts set forth in the petition, and shall, if satisfied from the evidence, find and adjudge who are or were the heirs or next of kin of the decedent * * *." (Emphasis added.)

3. "The purpose and intent of "The Determination of Heirship Act,' is *to make certain by court order* the persons entitled to the estate of a decedent." *Brawley v. Thomas,* 82 O. App. 400, 81 N. E. (2d) 719 (1947).

4. In Ohio, in a proceeding to determine heirship the burden of proving the relationship rests upon the one asserting it. *LaRoche v. LaRoche,* 10 O. App. 242 (1917). In this case, the petitioners had to establish that they were in fact the brother and niece of the decedent.

5. In Ohio, hearsay evidence cannot establish heirship. *Olijan v. Lublin,* 38 Abs. 393, 50 N. E. (2d) 264, aff'd. 143 Ohio St. 417, 55 N. E. (2d) 658 (1944). See also, *In re Bokey's Estate,* 412 Pa. 244, 194 A. (2d) 194 (1963).

6. The Probate Court specifically found that "the transcript of testimony taken before the referee shows no proof of the nature required by statute which would establish heirship of persons in Romania." See Opinion, Probate Court of Cuyahoga County, Petitioner's Appendix I.

Rule 30 (K) (3) of the Rules of the Probate Court of Cuyahoga County in pertinent part provides: "The Judge will consider the bill of exceptions, the assignment of errors, brief and oral arguments and make a decision: * * * (3) Modify the finding of the referee and reduce it to the judgment of the Court, as modified."

7. The petitioner raised no constitutional question in either the trial court or the Court of Appeals. The petitioner for the first time attempted to raise constitutional issues in the Supreme Court of Ohio. In Ohio, constitutional issues must be raised at the earliest possible moment. See *State v. Perkins,* 165 Ohio St. 185, 134 N. E. (2d) 829 (1956).

8. The Supreme Court of Ohio, in affirming the Court of Appeals, found that the case presented no substantial constitutional question. See Journal Entry, Supreme Court, Petitioner's Brief, Appendix II.

9. The consular convention, Treaty Series No. 297, in no way deals with the type of proof necessary to establish heirship in the State of Ohio. The Treaty does not by some elusive process transform unreliable hearsay into probative evidence of facts sufficient to establish heirship. See *In re Bokey's Estate,* 412 Pa. 244, 194 A. (2d) 194 (1963).

10. The Petitioner did not establish that the forms he presented to the Probate Court of Cuyahoga County, Ohio were, in fact, "official documents * * * duly authenticated and legalized" within the purview of the Treaty. No proof was offered to establish the law of Romania at trial. See Ohio Revised Code Section 2317.45 and Ohio Revised Code Section 2317.46; *Olijan v. Lublin,* 38 Abs. 393, 50 N. E. (2d) 264, aff'd. 143 Ohio St. 417, 55 N. E. (2d) 658 (1944). Nevertheless, the Court admitted these documents into evidence, but held that they did not establish that the brother and niece were alive or that the petitioners were in fact the brother and niece. See *In re Bokey's Estate,* 412 Pa. 244, 194 A. (2d) 194 (1963).

11. The cases cited by petitioner in no way touch upon the issue in the instant case. In *Geofroy v. Riggs,* 133 U. S. 258 (1889), it was decided that a citizen of France had the right to inherit land in the District of Columbia by descent from a citizen of the United States. This case is of course good law today, but it is irrelevant to the case at bar.

In *United States v. Belmont,* 301 U. S. 324 (1937), the issue was whether the United States had the right to

a bank deposit in respondent's bank by reason of a compact between the United States and Russia. Again, the case is far afield from issues concerning the probative effect of hearsay in a proceeding to determine heirship.

CONCLUSION.

No constitutional issue was raised by petitioners until they requested the Supreme Court of Ohio to review the adverse decisions of the Probate Court and the Court of Appeals. The Supreme Court of Ohio held that no constitutional issue was present in this case.

The law of Ohio regarding the quantum of evidence needed to prove heirship does not conflict with any treaties or the foreign affairs of the United States government. The Treaty referred to by petitioner does not govern the probative value, if any, of hearsay evidence in the trial of a lawsuit to determine heirship in the State of Ohio.

The case at bar was simply one in which the petitioner did not produce sufficient evidence to prove his case. Accordingly, respondents maintain that the petition for writ of certiorari be denied.

Respectfully submitted,

ELLIS V. RIPPNER and
RICHARD W. SCHWARTZ,
Counsel for Respondent.

APPENDIX.

STATUTES.

Ohio Revised Code, Section 2317.45. Reasonable notice to adverse party:

> "Any party may present to the trial court any admissible evidence of the statutes of every state, territory, or other jurisdiction of the United States, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise."

Ohio Revised Code, Section 2317.46. Exceptions:

> "The law of a jurisdiction other than those referred to in section 2317.44 of the Revised Code shall be an issue for the court, but shall not be subject to sections 2317.44 and 2317.45 of the Revised Code concerning judicial notice.
>
> This section and sections 2317.44 and 2317.45 of the Revised Code shall be so interpreted and construed as to effectuate their general purpose to make the law of this state uniform with those states which enact similar legislation."

RULES.

Rules of the Probate Court of Cuyahoga County, Ohio: Rule 30 (k)

(k) "The Judge will consider the bill of exceptions, the assignment of errors, briefs and oral arguments and make a decision:

1. To confirm the finding of the referee and reduce it to the judgment of the Court.

2. To vacate the finding of the referee and order a re-reference and rehearing before another referee.

3. Modify the finding of the referee and reduce it to the judgment of the Court, as modified.

4. Re-refer to the referee for hearing of newly discovered or additional proffered evidence or for any other proper purpose.

5. Make such other or further order or judgment warranted by law or stipulated by all parties of record."